

A **Arab Malaysian Finance Bhd v Badiaddin bin Mohd
Mahidin & Anor**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N-02-
679-95.

B ABU MANSOR, NH CHAN AND SHAIK DAUD JJCA
24 JANUARY 1996

Civil Procedure — Functus officio — Application to set aside order for sale of land — Application to set aside made to the same High Court that made the order, but presided by different judge — Whether one High Court could set aside final order of another High Court or its own final order — Whether court was functus officio

C The respondents were the registered owners of land held under Malay reservation ('the land'). They entered into a joint venture agreement with one Ismail bin Omar ('Ismail') to develop the land into a housing scheme. In order to get funds for the scheme, Ismail applied for and obtained a loan of RM400,000 ('the loan') from the appellant. As security for the loan, the land was mortgaged to the appellant. The joint venture failed and Ismail ended up owing the appellant a sum of RM300,000. The appellant commenced proceedings against Ismail for the recovery of the money owed. In the meantime, the respondents applied for a declaration that the mortgage held by the appellant was invalid because — by virtue of s 7 of the Malay Reservation Enactment (FMS Cap 142) — the appellant was not competent to hold the mortgage over the land as it was not considered to be a Malay or a Malay holding. The High Court judge heard the respondents' application and made the order ('the first order'), inter alia, that: (i) the mortgage was invalid; and (ii) the respondents should return all monies to the appellant. Following the first order, the appellant applied for the sale of the land either by public auction or private treaty with a view to repay the loan. The High Court judge made the order ('the second order'), inter alia, that: (i) the respondents jointly and/or severally repay the loan with interest thereon; and (ii) alternatively, the land be sold by public auction or private treaty, and the proceeds of sale to be utilized to repay the loan. The respondents filed an appeal to the (then) Supreme Court which was struck off on the ground that no leave to appeal had been obtained beforehand. Instead of making a fresh application for leave, the respondents commenced afresh by a summons in chambers in the High Court — the same court which gave the second order, albeit now being presided by a different judge — for a declaration that that part of the second order, ie the alternative order of sale by either public auction or private treaty, was invalid. The High Court judge allowed the application and ordered that that part of the second order be set aside ('the third order'). The appellant appealed.

Held, allowing the appeal:

- (1) It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order. The High

Court, having rightly or wrongly given the second order, is functus officio, and it cannot set its own order aside (see p 625H); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 followed.

- (2) Since the respondents' appeal to the (then) Supreme Court was only struck off and not dismissed, the proper course then would be to have made a fresh application for leave with all consequential orders (see p 625G).
- (3) Clearly, the second order was a final order of the High Court. Therefore, that order cannot be altered, varied or set aside by the same court even though presided over by another judge. It also did not come under the provision of O 20 r 11 of the Rules of the High Court 1980. The only recourse was to appeal to a higher court which has jurisdiction to pronounce the validity or otherwise of the second order. Therefore, the third order was invalid and ought to be set aside (see p 626C); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 followed.

[Bahasa Malaysia summary]

Penentang-penentang adalah pemunya berdaftar tanah yang dipegang di bawah rizab Melayu ('tanah tersebut'). Mereka mengikat suatu perjanjian usahasama dengan seorang Ismail bin Omar ('Ismail') untuk membangunkan tanah tersebut kepada rancangan perumahan. Untuk mendapatkan wang bagi rancangan itu, Ismail memohon dan memperolehi pinjaman sebanyak RM400,000 ('pinjaman tersebut') daripada perayu. Sebagai cagaran kepada pinjaman tersebut, tanah tersebut digadai-janji kepada perayu. Usahasama itu gagal dan Ismail terhutang dengan perayu sebanyak RM300,000. Perayu memulakan prosiding terhadap Ismail untuk mendapatkan kembali wang yang terhutang. Sementara itu, penentang-penentang memohon untuk deklarasi bahawa gadai-janji yang dipegang oleh perayu adalah tidak sah kerana — memandangkan s 7 Enakmen Perizaban Melayu (NMB Bab 142) — perayu tidak kompeten untuk memegang gadai-janji ke atas tanah tersebut kerana ia tidak dikira sebagai Melayu atau pemegangan Melayu. Hakim Mahkamah Tinggi mendengar permohonan penentang dan membuat perintah ('perintah pertama'), antara lain, bahawa: (i) gadai-janji itu adalah tidak sah; dan (ii) penentang-penentang hendaklah memulangkan kesemua wang kepada perayu. Berikutan dengan perintah pertama, perayu memohon untuk jualan tanah tersebut sama ada melalui lelong awam atau triti persendirian bagi tujuan pembayaran semula pinjaman tersebut. Hakim Mahkamah Tinggi membuat perintah ('perintah kedua'), antara lain, bahawa: (i) penentang-penentang secara bersama dan/atau secara berasingan membayar balik pinjaman tersebut dengan faedah ke atasnya; dan (ii) sebagai alternatif, tanah tersebut dijual secara lelong awam atau triti persendirian, dan hasil jualan digunakan untuk membayar balik pinjaman tersebut. Penentang-penentang memfailkan rayuan kepada Mahkamah Agung (pada ketika itu) yang

- A mana telah dibatalkan atas alasan bahawa tidak ada kebenaran untuk membuat rayuan diperolehi terlebih dahulu. Penentang-penentang tidak memulakan semula permohonan untuk kebenaran, sebaliknya mereka memulakan semula dengan saman dalam kamar di Mahkamah Tinggi — mahkamah yang sama yang memberikan perintah kedua, walaupun dipengerusikan oleh hakim yang lain — untuk deklarasi bahawa sebahagian perintah kedua, iaitu perintah alternatif jualan secara lelong awam atau triti persendirian, adalah tidak sah. Hakim Mahkamah Tinggi membenarkan permohonan dan membuat perintah mengetepikan sebahagian perintah kedua itu ('perintah ketiga'). Perayu membuat rayuan.
- B

C **Diputuskan**, membenarkan rayuan:

- (1) Adalah undang-undang yang mantap bahawa satu Mahkamah Tinggi tidak boleh mengetepikan perintah muktamad Mahkamah Tinggi yang lain, apatah lagi perintah muktamadnya sendiri. Mahkamah Tinggi adalah functus officio apabila — sama ada dengan betul atau salah — ia telah memberikan perintah kedua, dan ia tidak boleh mengetepikan perintahnya sendiri (lihat ms 625H); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 diikuti.
- D
- (2) Oleh kerana rayuan penentang ke Mahkamah Agung (pada ketika itu) hanya dibatalkan dan tidak ditolak, tindakan yang wajar yang patut diambil adalah membuat permohonan baru untuk kebenaran dengan semua perintah-perintah berbangkit (lihat ms 625G).
- E
- (3) Adalah jelas bahawa perintah kedua adalah perintah muktamad Mahkamah Tinggi. Oleh itu, perintah itu tidak boleh dipinda, diubah atau diketepikan oleh mahkamah yang sama walaupun dipengerusikan oleh hakim yang lain. Ianya juga tidak berada di bawah peruntukan A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980. Jalan yang ada hanyalah untuk membuat rayuan kepada mahkamah yang lebih tinggi yang mempunyai bidang kuasa untuk mengisytiharkan kesahan atau sebaliknya berkenaan dengan perintah kedua. Oleh itu, perintah ketiga adalah tidak sah dan patut diketepikan (lihat ms 626C); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 diikuti.]
- F
- G

H **Notes**

For cases on functus officio, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1409–1412.

Case referred to

I *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143

Legislation referred to

Malay Reservation Enactment (FMS Cap 142) s 7
Rules of the High Court 1980 O 20 r 11

Appeal from: Originating Summons No 24-110-95 (High Court, Seremban) A

JW Appukuttan (Wang Kuo Shing & Co) for the appellant.
V Ganesalingam (Krishna & Associates) for the respondents.

Cur Adv Vult B

Shaik Daud JCA: This appeal arises from the decision of the Seremban High Court given on 22 September 1995 wherein the learned judge, inter alia, set aside that part of an earlier order dated 8 October 1990 handed down by the same court which ordered that the land held under title No EMR 315, Lot 342 Mukim Repah Tampin, Negeri Sembilan ('the land') be sold by public auction and/or private treaty. C

The facts of the case are that the respondents are the registered owners of the land which is held under Malay reservation. They entered into a joint venture agreement with one Ismail bin Omar ('Ismail') to develop the land into a housing scheme. In order to get funds for the scheme, Ismail applied for and obtained a loan of RM400,000 from the appellant. The loan was granted and as a security for the loan, the land was mortgaged to the appellant. Unfortunately, the appellant was not competent to hold the mortgage over the land as it is not considered to be a Malay or a Malay holding. Under s 7 of the Malay Reservation Enactment (FMS Cap 142) ('the Enactment'), only a Malay or gazetted Malay holding is capable of holding Malay reservation land. Unfortunately also, the joint venture failed and Ismail ended up owing the appellant to the tune of some RM300,000. Accordingly, the appellant commenced proceedings against Ismail for the recovery of the money owed. D E

In the meantime, the respondents applied for a declaration that the mortgage held by appellant was invalid by virtue of s 7 of the Enactment. On 21 March 1988, the Seremban High Court judge, the late Mustapha Hussain, heard the respondents' application and made the following orders ('the first order'): F

- (1) the mortgage was invalid; G
- (2) the order by the land administrator given to the appellant for the sale of the land was also invalid;
- (3) the land administrator was ordered to cancel the entry of the mortgage;
- (4) the respondents shall return all monies delivered to them by the appellant; H
- (5) the respondents were prohibited from dealing with the land as long as the loan remains unpaid; and
- (6) either party be at liberty to apply in order to execute the above orders. I

Following the first order, the appellant — by summons in chambers dated 4 May 1988 — applied for the sale of the land either by public auction or private treaty with a view to repay the loan including interest. On

- A 8 October 1990, the late Mustapha Hussain J made the following orders ('the second order'):
- (1) a declaration that the respondents had in fact received the loan or the facility from the appellant;
 - (2) the respondents jointly and/or severally repay the appellant a sum of RM300,000 together with interest thereon;
 - (3) alternatively, the land be sold by public auction or private treaty; and
 - (4) the proceeds of sale to be utilized to pay the RM300,000 with interest.
- C It would appear that the respondents were unhappy with the second order and rightly filed an appeal to the (then) Supreme Court. The appeal, however, was struck off on the ground that no leave to appeal had been obtained beforehand. Instead of making a fresh application for leave with all consequential orders, some seven months later, the respondents
- D commenced afresh by a summons in chambers dated 9 March 1995 in Seremban High Court — the same court which gave the second order, albeit now being presided by a different judge — for a declaration that that part of the second order, ie the alternative order of sale by either public auction or private treaty was invalid. The summons in chambers was in fact heard on 22 September 1995 before Mohd Noor J, who at that date
- E presided over Seremban High Court. The learned judge allowed the application and accordingly set aside that part of the second order ('the third order').

- Let us pause at this point to say that without going into the merits of the second order, we would have thought that the proper course for the respondents to adopt, if they find themselves unhappy with that order, would be to appeal to the (then) Supreme Court, as at that time that was the only court that could declare as being invalid or otherwise any order of the High Court. As mentioned earlier, they in fact did appeal to the then Supreme Court but their appeal was struck off since they failed to obtain leave to appeal beforehand. Since their appeal was only struck off and not dismissed, the proper course then would be to have made a fresh application for leave with all consequential orders. Instead, the respondents applied by summons in chambers praying for the Seremban High Court to set aside its own order. It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order. It is our view that the Seremban High Court, having rightly or wrongly given the second order, is functus officio, and it cannot set its own order aside. In *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, the learned judge had made an order for sale in foreclosure proceedings. The order was made after hearing all the parties and was made despite a claim of *non est factum*
- H and allegations of fraud and forgery by the respondent. There was no appeal against that order. The respondent applied to set aside the judgment which at first was refused, but on a second application it was allowed. On appeal, the Federal Court held that the learned judge was functus officio.
- I

At p 144 of the judgment, Chang Min Tat FJ (as he then was) who delivered the judgment held:

Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court.

Clearly, the second order is a final order of the Seremban High Court. Therefore, that order cannot be altered, varied or set aside by the same court even though presided over by another judge. Nor does it come under the provision of O 20 r 11 of the Rules of the High Court 1980. The only recourse is to appeal to a higher court which has jurisdiction to pronounce the validity or otherwise of the second order. Therefore, we feel that, with respect, Mohd Noor J ought not to have entertained the respondents' application. The third order is, to our mind, invalid and ought to be set aside. We would therefore allow the appeal with costs, and the deposit to be refunded.

NH Chan JCA: I agree that the appeal should be allowed.

Appeal allowed.

Reported by Jafisah Jaafar
